

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BULENT ERTUR, a single man,

Plaintiff,

v.

CAROL L. EDWARD and JESSE F.
BERGER, husband and wife, and the marital
community composed thereof; CAROL L.
EDWARD, P.S., a Washington Professional
Service Corporation doing business in
Washington,

Defendants.

Case No. 05-1532 JLR

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OF
DISMISSAL AND MOTION TO STRIKE
EXPERT REPORT OF AHMET
CHABUK

**NOTED TO BE HEARD:
FEBRUARY 9, 2007**

**[NO ORAL ARGUMENT
REQUESTED]**

I. RELIEF REQUESTED

Defendants Carol L. Edward and Jesse F. Berger, (hereinafter "Edward") pursuant to Federal Rules of Civil Procedure 56, hereby move for a summary judgment of dismissal of plaintiff's claims, with prejudice, and costs.

Defendants also request the "Expert Report" of Ahmet Chabuk, dated November 20, 2006 and filed as Docket Number 32 be stricken.

II. SUMMARY OF ARGUMENT

Ertur seeks to blame Edward for his being deported. The only competent evidence of record is that Ms. Edward's representation of plaintiff met the standard of care required of

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF
DISMISSAL: Case No. 05-1532 JLR - 1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3010
Seattle, WA 98101
206.622.1711

1 her and did not cause plaintiff any damages.

2 Edward represented Mr. Ertur for a brief period of time. Prior to that representation,
3 a final order of removal (deportation) had already been entered and his prior counsel had
4 already missed the appeal date on that order. Subsequent to her representation, Mr. Ertur
5 obtained an I360 (a special immigrant petition which allows the petitioner to be eligible for
6 consideration for entry into or to stay in the country) based upon a Violence Against Women
7 Action (VAWA) petition, but he and his counsel at the time failed to take proper steps to
8 prevent his removal. Edward complied with the standard of care in her representation of
9 Ertur and her representation is unrelated to Mr. Ertur's claimed damages.

10 Edward supports this motion with competent and qualified expert testimony on her
11 compliance with the standard of care and establishes that there is no causal link between any
12 alleged acts or omissions by her and the damages claimed by the plaintiff. The only expert
13 testimony offered on behalf of the plaintiff is an untimely "expert report" authored and
14 signed by plaintiff's own trial counsel.

15 Defendants submit that this matter is a legal malpractice matter where expert
16 testimony is appropriate and necessary for both the standard of care and causation. Now,
17 after the conclusion of discovery, the plaintiff cannot raise material issues of fact to support
18 key elements of his case, and the case should be dismissed.

19 In addition, to the extent that the plaintiff relies almost exclusively on the granting of
20 an I360 based on his VAWA petition as the basis for establishing both inferences of
21 negligence and of damages, that decision is not final as it has been reopened by the
22 government and is currently being reconsidered.

23 III. FACTS

24 A. Underlying Claim Facts

25 The extensive factual background and the material uncontroverted facts are set forth
26 before this Court in defendants' initial motion to dismiss already on file with this Court.

1 [Docket No. 10, pp. 4-5.] These facts are augmented by the Expert Report of Zachary
 2 Nightingale, filed contemporaneously with this motion. This motion will not attempt to
 3 reiterate the very detailed factual background that is already before the court, but only to
 4 briefly summarize the pertinent timeline.

5 A final order of removal (deportation) had been entered against Ertur, and the appeal
 6 deadline for that order had already been missed by prior counsel before Ms. Edward ever
 7 represented Ertur. *See* Edward Decl., ¶¶3 and 4. Ms. Edward became involved on May 10,
 8 2002 to take over Mr. Ertur's pending habeas corpus petition. *See* Edward Decl. at ¶3.

9 Ms. Edward withdrew from representation of Mr. Ertur on September 27, 2002. *See*
 10 Edward Decl., ¶3. The withdrawal was motivated both by Mr. Ertur's failure to provide her
 11 complete and truthful information about his past, *see* Edward Decl., ¶11, and by his failure to
 12 pay any of her bill. *See* Edward Decl., ¶7. No deadlines elapsed during Ms. Edward's
 13 representation of Mr. Ertur. *See* Edward Decl., ¶3.

14 After Ms. Edward withdrew, Mr. Ertur was unable to find counsel who would
 15 represent him in his habeas corpus and immigration matters. *See* Report of Nightingale at
 16 pp. 16-17, Ex. B, Second Decl. Howard. He was interviewed by a pro bono professional at
 17 Northwest Immigrant Rights Project ("NWIRP") who informed him of his options to request
 18 relief under the Violence Against Women Act ("VAWA"). *See* Letter dated 11/7/2002 from
 19 NWIRP to Bulent Ertur, attached as Exhibit S, Edward Decl. at pp. 62-63, Docket No. 12 as
 20 filed 12/27/2005. Although Mr. Ertur could have filed a self petition at that time and sought
 21 additional time to provide supporting evidence, he did not do so. Much of the critical
 22 information he subsequently relied upon, including the findings of fact and conclusions of
 23 law from his divorce matter, did not yet exist. *See*, Expert Report of Zachary Nightingale
 24 (Nightingale Report), at p. 10, Ex. B to Second Decl. of Christopher Howard dated January
 25 16, 2007.

26 Mr. Ertur's divorce proceeding went to trial in August, 2003. Findings of facts and

1 conclusions of law favorable to Mr. Ertur were entered on August 8, 2003. With the support
 2 of those findings he then filed a self petition for VAWA relief. *Id.* This was initially
 3 granted, Ex. A, Docket No. 19-1, Motion for Reconsideration, although it has more recently
 4 been reopened and its status is currently unclear. *See* Second Decl. of Howard, Ex. A.

5 While the I360 petition was pending, a Motion to Reopen was filed with the
 6 immigration court via subsequent counsel, Mr. Manuel Rios. This motion was denied by the
 7 immigration court on December 1, 2004, finding that Mr. Ertur had not proceeded in due
 8 diligence and finding that there was no indication that Mr. Ertur could have obtained any
 9 different result given Mr. Frick, the original counsel, missing the original appeal date. *Id.* A
 10 Motion to Reconsider was also denied. After that, that Mr. Ertur obtained an I-360 from his
 11 VAWA petition. At that point, both Mr. Ertur and his then attorney of record on the
 12 immigration matters, Mr. Chabuk, apparently failed to obtain any stay of removal prior to the
 13 day he was removed. Nightingale Report at p. 12. (*See* Second Decl. of Christopher Howard
 14 dated January 16, 2007). And, the I360 itself does not entitle Mr. Ertur to stay in this country
 15 if he is otherwise ineligible. Report of Nightingale at pp. 18-19.

16 Following the initial granting of the I360, there was never a new stay of removal filed
 17 with the appropriate forum, the Board of Immigration Appeals. This would have been the
 18 appropriate step to attempt to allow Mr. Ertur to stay in the country. *Id.* at 18. All of this
 19 occurred long after Ms. Edward was no longer involved in the representation of Mr. Ertur.
 20 *See* Report of Nightengale, pp. 17-19 for a more detailed discussion of the inappropriate
 21 step(s) that were not taken following the approval of the I360. Failure to take steps to allow
 22 Mr. Ertur to remain in the country, both before and after Ms. Edward's representation of
 23 Mr. Ertur, is unrelated to that representation.

24 B. Procedural Facts

25 Plaintiff filed this complaint for legal malpractice and damages on September 15,
 26 2005. Plaintiff alleges jurisdiction based upon diversity of citizenship and amount in

1 controversy. Amended Complaint, Docket 5, ¶1.1.

2 Defendant filed a motion to dismiss pursuant to FRCP 12(b) and FRCP 56 and noted
3 it for hearing without oral argument on January 20, 2006. That motion was initially granted
4 by order of this Court on February 27, 2006, Docket No. 17.

5 Plaintiff moved for reconsideration on March 10, 2006, Docket No. 19. Plaintiff's
6 motion was relying heavily on the documents in the VAWA petition which were attached to
7 his motion, and the argument that the subsequent granting of VAWA relief established the
8 legal basis for plaintiff's claim. Docket No. 19, page pp. 6-8. This Court granted the motion
9 for reconsideration on April 28, 2006, Docket No. 27.

10 Discovery in this matter is now closed. Before the close of discovery defendants
11 provided a detailed expert report on the deadline set forth for expert disclosure. Plaintiff
12 made no offer of any expert disclosure or expert report on or near the disclosure deadline.
13 One month later, plaintiff filed an "expert report" authored and signed by plaintiff's counsel
14 in this case, Ahmet Chabuk., Docket No. 32.

15 Defendants now move this Court for summary judgment at the conclusion of
16 discovery because plaintiff cannot establish key issues of his case, including both breach of
17 the standard of care and causation.

18 IV. EVIDENCE RELIED UPON

19 This motion is based upon:

- 20 (1) the declaration of Carol L. Edward dated December 23, 2005, which is
21 already on file with this Court, Docket No. 12;
- 22 (2) the declaration of Christopher Howard dated December 27, 2005, which
23 is already on file with this Court, Docket No. 11;
- 24 (3) the Second declaration of Christopher Howard, dated January 17, 2007,
25 with attachments, specifically including the Expert Report of Zachary M.
26 Nightingale, dated and signed under penalty of perjury October 19, 2006;

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF
DISMISSAL: Case No. 05-1532 JLR - 5

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3010
Seattle, WA 98101
206.622.1711

(4) Plaintiff Expert report of Ahmet Chabuk, dated November 20, 2006,
Docket No. 32 (the subject of the request to strike)

And all other materials already on file with this court.

V. AUTHORITY AND ARGUMENT

Plaintiff cannot blame his prior counsel, Carol Edward, for his being removed from the United States. His allegation is that she should have made him aware of potential relief under the Violence Against Women Act (VAWA) even if she did not believe he had such a meritorious claim, and that she allegedly failed to cooperate with other, subsequent counsel. His claim is without merit. A final order of removal had been entered against Mr. Ertur, and prior counsel for Mr. Ertur had missed the appeal deadline, all before Ms. Edward became involved in the case. No deadlines passed or were missed during or due to Ms. Edward's representation. Mr. Ertur's subsequent VAWA application was based upon materials that were not available during Ms. Edward's representation. Despite originally receiving a grant of VAWA relief, subsequent counsel did not take the appropriate steps to allow Mr. Ertur to stay in the U.S.. And, the relief he did receive is neither final nor does an I360 by itself entitle Ertur to stay in the country.

Ms. Edward should not be blamed for mistakes made by others before and after her representation of Ertur. Ms. Edward complied with the standard of care for an immigration attorney and her representation was not a proximate cause of damage to the plaintiff.

The plaintiff's case is supported by: (1) mere allegation; (2) an assertion that because an I360 was subsequently granted, based upon information not known or available at the time of Ms. Edward's representation, that she should have pursued a VAWA application; and (3) the declaration of an "expert" who is plaintiff's own counsel and who was the subsequent counsel who failed to take the necessary steps to protect Mr. Ertur from removal when the I360 was granted. This should not be enough to survive this motion for summary judgment given the qualified and extensive expert report filed on behalf of defendant, the underlying

1 immigration law, as set forth in the expert report, and the lack of any evidence by plaintiff of
 2 any causal link between the actions of defendant and the injury claimed (removal from the
 3 U.S.).

4 **A. Standard for Summary Judgment**

5 Summary Judgment is appropriate at the conclusion of a case when it is clear that the
 6 party with the burden of proof can not prove an essential element of his case. *Celotex Corp.*
 7 *v. Catrett*, 477 U.S. 317, 322, 106 S Ct 2548, 91 L Ed 2d 265 (1986). And, as in *Celotex*,
 8 here the motion is brought at the conclusion of discovery. The defendants here have
 9 provided both substantial factual and expert support for their motion to show that the plaintiff
 10 can not provide a breach of duty, or proximate cause of the claim to damages. Once that
 11 burden has been carried by the moving party under FRCP 56, the opposing party may not
 12 rest upon its allegations, denials, or mere speculation. *See Anderson v. Liberty Lobby, Inc.*,
 13 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and *Matsushita Elec. Indus.*
 14 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 538 (1986).

15 Here defendant supports this motion with an expert opinion incorporating an
 16 extensive factual review establishing both that the defendant complied with the standard of
 17 care and that there was no causal connection between the defendant's acts or omissions and
 18 the plaintiff's claimed harm. The plaintiff should not be allowed to rest upon mere
 19 allegations or to rest upon arguments of his counsel, even if cloaked as an "expert report."

20 For Mr. Ertur to survive this motion and to have a claim, he must show both facts and
 21 law to establish all of the elements of a malpractice claim against Ms. Edward. This includes
 22 duty (at a time when she represented him), breach of that duty, and causation. Defendants
 23 submit that one or more of these elements will require expert testimony in the context of this
 24 case. Plaintiff has not submitted timely competent qualified expert testimony that may be
 25 used at trial. Plaintiff has only submitted an untimely report from plaintiff's own counsel.
 26 Plaintiff's claim will fail on one or all of the necessary elements.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF
 DISMISSAL: Case No. 05-1532 JLR - 7

SCHWABE, WILLIAMSON & WYATT, P.C.
 Attorneys at Law
 US Bank Centre
 1420 5th Ave., Suite 3010
 Seattle, WA 98101
 206.622.1711

B. The Standard for Legal Malpractice

This claim has been brought in this court on diversity jurisdiction. Amended Compl. ¶1.1, Docket No. 5. Washington substantive law applies *Erie R.R. v. Tomkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). This motion will attempt to avoid restating the argument already set forth before the court in the defendant's first motion. A few salient cases bear repetition. The essential elements of legal malpractice action are set forth in *Ang v. Martin*, 154 Wn 2nd 477, 114 P3d 637, 640 (2005):

- (1) The existence of an attorney-client relationship which give rise to a duty of care on the part of the attorney to the client;
- (2) An act or omission by the attorney in breach of the duty of care;
- (3) Damage to the client; and
- (4) Proximate causation between the attorney's breach of the duty and the damage incurred.

The plaintiff bears the burden of proving each element. *Hansen v. Wightman*, 4 Wn App 78, 88, 538 P2d 1238 (1975).

Although there is no specific hard and fast rule necessarily always requiring expert testimony to establish the standard of care, an expert testimony will frequently be necessary to establish elements of the case of malpractice. *See Walker v. Bangs*, 92 Wn 2nd 854, 858, 601 P2d 1279 (1979); *Lynch v. Republic Publishing*, 40 Wn 2d 379, 389, 243 P2d 638 (1952). By analogy to other professional negligence actions in Washington, where expert testimony is required, and where the defendant has brought forth a supporting expert, the plaintiff's case should be dismissed where the plaintiff cannot bring forth competent and admissible expert testimony. *Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 228-229, 770 P.2d 182 (1989).

In some cases, elements of breach of duty and proximate causation may be deemed to be questions of law appropriately decided by the court itself. *Brust v. Newton*, 70 Wn App

1 286, 290-93, 852 Pd 1092 (1993) *review denied*, 123 Wn 2d 1010 (1994). *See also Nielson*
 2 *v. Eisenhower and Carlson*, 100 Wn App 584, 594, 993 Pd 42 (2000) (where the court held
 3 in determination of whether an appellate court would have granted review was a question of
 4 law for the court's resolution).

5 Defendants Edward have supported this motion with a competent and detailed expert
 6 report. *See* the Report of Nightingale, Ex. B, Sec. Decl. Howard dated January 17, 2007.
 7 The plaintiff has submitted only the report of his current counsel in this case, which is neither
 8 competent nor qualified expert testimony as well as being untimely by this Court's order.

9 **C. The Defendants Have Met Their Burden to Establish No Material Issue**
 10 **of Fact.**

11 1. Nightingale Establishes Edward Complied With the Standard of Care and
 12 Was Not the Cause of Harm to Plaintiff

13 Defendants Edward have shown that Edward complied with the standard of care. She
 14 assumed representation of a habeas corpus case after a final order of removal had been
 15 entered. She evaluated the client's options. At the time, there were multiple reasons why a
 16 VAWA claim would not only be inappropriate, but might actually hurt Mr. Ertur in other
 17 matters. *See* Report of Nightingale, pp. 13-14, Ex. B, Sec. Decl. Howard. At most, the
 18 plaintiff might argue that he disagrees with Ms. Edward's judgment in this matter. Errors in
 19 judgment should not be the basis for establishing a legal malpractice action. *Halverson v.*
 20 *Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986). There is neither any pragmatic
 21 common sense reason why a lay person should infer malpractice nor any admissible and
 22 competent or timely disclosed expert testimony to criticize the legal representation she
 23 provided.

24 Defendant has also established several reasons why the alleged failure of Ms. Edward
 25 is not a proximate cause of the ultimate outcome and damages alleged in this case. These
 26 reasons are set forth in detail throughout the Expert Report of Zachary Nightingale and are

1 summarized at pages 18-20 below. These include highly technical questions of law which
 2 should either be legal questions for the court to resolve, thus amenable to summary
 3 judgment, or subject to expert testimony. Once again, plaintiff has not provided timely,
 4 competent or admissible expert testimony to create a material issue of fact to block summary
 5 judgment on the causation issues.

6 2. Plaintiff's Counsel's "Expert Report" Should be Stricken

7 Plaintiff has filed an untimely "expert report" authored and signed by his own
 8 counsel. This should not be allowed and the report should be stricken, both because it is in
 9 violation of Washington's Rules of Professional Conduct (RPC) and because he has not
 10 established an adequate foundation to qualify as an expert. In addition, the expert report
 11 disclosure was one month late, and not in compliance with this Court's deadlines established
 12 in its minute order of June 2, 2006.

13 (a) *The Lawyer may not Testify as an Expert Witness in the Same Matter*

14 A Washington lawyer generally may not act as both advocate and witness in a matter.
 15 This is specifically proscribed by Washington's RPC 3.7:

16 (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to
 17 be a necessary witness unless:

- 18 (1) the testimony relates to an uncontested issue;
- 19 (2) the testimony relates to the nature and value of legal services
 rendered in the case;
- 20 (3) disqualification of the lawyer would work substantial hardship on
 the client; or
- 21 (4) the lawyer has been called by the opposing party and the court
 rules that the lawyer may continue to act as an advocate.

22 Here, exceptions 1, 2 and 4 clearly do not apply. The plaintiff's counsel should not
 23 be allowed to claim exception 3 (substantial hardship) to allow him to serve as both counsel
 24 and expert in the case. Otherwise, anytime a party needed an expert and could not find one,
 25 they could simply use their own attorney to fill that role. That is what Plaintiff seeks to do in
 26 this case.

1 Defendants have a right to object to this testimony under the comments to the RPCs
 2 (which have been adopted in Washington). "The opposing party has proper objection where
 3 the combination of roles may prejudice that party's rights in the litigation." Comment 2, in
 4 part, to Washington RPC 3.7. Here, the mixture of the role of advocate and legal
 5 malpractice "expert" falls into the category of testimony that would be prejudicial to allow.
 6 "Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice
 7 depends on the nature of the case, the importance and probable tenor of the lawyer's
 8 testimony, and the probability that the lawyer's testimony will conflict with that of other
 9 witnesses." Comment 4, in part, to Washington RPC 3.7. Mr. Chabuk's proffered expert
 10 report is in response to the timely expert report of Zachary Nightingale, and directly
 11 contradicted by it, placing the proffered testimony as central to what is in dispute in this case.

12 Plaintiff's counsel's proffering himself as an expert is audacious enough that finding
 13 authority directly on point is difficult. The closest published opinion found to a comparable
 14 ethical provision is *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 624
 15 P.2d 296 (1981), where the Arizona Supreme Court ruled that the trial judge did not abuse
 16 his discretion by ruling that an attorney could not both try the matter and testify as a witness
 17 in the same proceeding. The Arizona Supreme Court reviewed case law from around the
 18 country in concluding that even if an attorney were competent to testify he may not be
 19 allowed to testify (or may be disqualified from representation).

20 The attorney may be disqualified not because his testimony is incompetent but
 21 because of the dangers of prejudice inherent in the practice. [Citations omitted]
 22 *Cottonwood Estates*, 128 Ariz. at 102, 624 P.2d at 299.

23 The Court went on to observe:

24 A review of cases from other jurisdictions reveals that courts normally
 25 refuse to condone the practice of acting as both advocate and witness in
 26 the same proceeding. [Citations omitted] Even though the attorney is
 otherwise competent to testify, it is generally considered a serious breach

1 of professional etiquette and detrimental to the orderly administration of
 2 justice for an attorney to take the stand in a case he is trying. [Citations
 omitted]

3 *Cottonwood Estates*, 128 Ariz. at 102, 624 P.2d at 299.

4 The court in *Cottonwood* disqualified the attorney from representing the party in the
 5 case. It noted the option of disallowing the testimony:

6 We would like to believe an attorney who recognizes that he ought to be
 7 called as a witness would withdraw out of respect for the profession of
 8 which he is a member and the court of which he is an officer rather than
 9 out of fear of discipline. In any event, when the court is faced with an
 10 attorney who refuses to withdraw and insists on taking the stand, the court
 11 may in its discretion disallow the testimony, disqualify the attorney, or
 12 impose any other procedural safeguards necessary to preserve the integrity
 of the fact finding process. If the court finds unethical considerations
 raised by such testimony constitute prejudice great enough to outweigh the
 probative value of otherwise relative evidence, the testimony may be
 disallowed. [Citations omitted]

13 *Cottonwood Estates*, 128 Ariz. at 105, 624 P.2d at 302. Washington's current RPC 3.7 is
 14 substantially similar to the rule reviewed by the court in *Cottonwood*.

15 Here, Mr. Chabuk may or may not have put himself forward as a factual witness
 16 (because in his expert report he appears to rely upon his own telephone conversations as
 17 evidence) but has more directly offered himself as an expert where he was unable to find a
 18 supportive expert in the case. This tactical ploy should not be allowed or condoned. His
 19 expert report and proffered expert testimony should be stricken and disallowed.

20 Washington case law generally supports striking legal conclusions contained in
 21 affidavits. See e.g., *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826
 22 (1994) ("The legal opinions of witnesses are inadmissible."); *Parkin v. Colocousis*, 53 Wn.
 23 App. 649, 653 (1989) ("Neither the trial court nor an appellate court can consider
 24 conclusions of law"); *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130,
 25 133 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988) ("Conclusions of law stated in an
 26 affidavit filed in a summary judgment proceeding are improper and should be disregarded.");

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF
 DISMISSAL: Case No. 05-1532 JLR - 12

SCHWABE, WILLIAMSON & WYATT, P.C.
 Attorneys at Law
 US Bank Centre
 1420 5th Ave., Suite 3010
 Seattle, WA 98101
 206.622.1711

1 *Hiskey v. Seattle*, 44 Wn. App. 110, 113 (1986) (“An affidavit is to be disregarded to the
 2 extent that it contains legal conclusions.”); *Orion Corp. v. State*, 103 Wn.2d 441, 461-462
 3 (1985) (“[t]o the extent the affidavit contained legal conclusions it is to be disregarded[.]”).
 4 While in Washington an affidavit or declaration from counsel may be allowed to lay
 5 foundation or to establish facts about which the attorney has direct knowledge, legal
 6 conclusions contained in such a declaration are to be disregarded or stricken. *See American*
 7 *Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 763 (1976).

8 (b) *Mr. Chabuk’s Report Lacks Adequate Foundation to be Allowed*

9 Mr. Chabuk’s proffered expert report should be excluded because he has not
 10 established a sufficient foundation to be qualified as an expert on immigration law. The
 11 Supreme Court has stated that a trial judge has the capacity act as a gatekeeper by screening
 12 evidence and only admitting relevant, reliable evidence. *Daubert v. Merrel Dow Pharm.*,
 13 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under both Federal law and
 14 Washington case law the trial court should require an expert to establish adequate expertise
 15 before allowing expert opinion. *See, e.g., Harris v. Groth*, 99 Wn.2d 438, 450-451, 663 P.2d
 16 113 (1983). Mr. Chabuk has presented no evidence to establish he is qualified as an expert
 17 on immigration law.

18 Mr. Chabuk’s report establishes he is not a practitioner of immigration law. *See*
 19 Chabuk’s report at pp. 24-25. Mr. Chabuk must show he is familiar with the practice of
 20 immigration law to qualify as an expert in this case. He has not. In professional negligence
 21 cases, simply having a degree in the right area of practice is not sufficient to establish
 22 expertise in the relevant specialty. This was clearly established in medical negligence in
 23 *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 229, 770 P.2d at 182 (1989):

24 In fact, not even a medical degree bestows the right to testify on the
 25 technical standard of care; a physician must demonstrate that he or she has
 26 sufficient expertise in the relevant specialty. [citation omitted]

1 *Young v. Key Pharmaceuticals*, 112 Wn.2d at 229. The Young court upheld the trial judge's
 2 exclusion of a pharmacologist's testimony to establish a physician's standard of care relating
 3 to the use of a certain medication. This rule continues to the present:

4 The general rules that a practitioner of one school of medicine is incompetent
 5 to testify as an expert in a malpractice action against a practitioner of another
 6 school.

7 *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005). In *Eng*, the court found that an
 8 infectious diseases expert did lay sufficient foundation to establish the applicability of his
 9 testimony with respect to the care required of a neurosurgeon regarding a particular
 10 infectious disease. *Id.* at 179. The Court found the expert laid sufficient foundation by
 11 showing he had sufficient familiarity with the procedure at issue. *Id.* at 177. In the instant
 12 case, Mr. Chabuk has not laid such a foundation.
 13

14 There is no evidence before the court that establishes Mr. Chabuk is familiar with the
 15 practice of immigration law. Prior to this case, Mr. Chabuk never practiced or studied
 16 immigration law. Mr. Chabuk's expert report admits this and states, "[In 2002] I had a very
 17 little knowledge of the immigration law." Expert Opinion Report of Ahmet Chabuk, p. 23.
 18 Despite this lack of familiarity, Mr. Chabuk attempts to lay a foundation for his opinions by
 19 stating he completed legal research and he spoke to attorneys specializing in immigration
 20 law. *Id.* Immigration law is a highly specialized and technical area of law that includes pre-
 21 trial and court procedures that differ greatly from the general practice of law. Mr. Chabuk's
 22 limited study of immigration law shows that he does not have sufficient familiarity with
 23 immigration law to render an expert opinion. Mr. Chabuk's credentials with respect to an
 24 immigration practitioner are inadequate, and should be rejected. Mr. Chabuk's testimony
 25 should be excluded in this regard.
 26

1 (c) *Mr. Chabuk's Report Should Also Be Stricken Because It Was Not*
 2 *Timely Disclosed*

3 This Court issued an order providing that the deadline for disclosure of expert reports
 4 was October 19, 2006. Plaintiff never requested or moved this court for a change in the
 5 scheduling order or for more time. The parties never agreed to an extension or a change in
 6 the order to allow more time for the filing of a report. Indeed, the necessity of expert
 7 testimony has been at the forefront of this case since the Court's June 2, 2006 order, Docket
 8 No. 30, providing the following: Expert Witness Disclosure/Reports Under FRCP 26(a)(2)
 9 due by October 19, 2006.

10 At the time an expert report was due, plaintiff had retained an expert in the parallel
 11 case *Ertur v. Stroupe*. See Second Decl. of Christopher Howard. The deposition of that
 12 expert was one of the materials reviewed by Zachary Nightingale in preparation of his
 13 opinions in this case. However, that expert was not named in this case and no report was
 14 ever filed from an independent expert in this case. Instead, Mr. Chabuk filed an expert report
 15 authored and signed by himself on November 20, 2006, one month after the deadline for
 16 disclosure of expert reports.

17 **C. Ms. Edward Acted Ethically In Not Pursuing VAWA**

18 Ms. Edward was involved in the representation of Mr. Ertur for a short period of time
 19 after prior counsel had already missed the deadline for filing appeal on the final order of
 20 removal. During that time, Ms. Edward did not pursue VAWA relief. Ms. Edward did not
 21 feel it was appropriate, and highly qualified expert review of the facts of this case supports
 22 that assessment. See Report of Zachary Nightingale at pp. 12-15. Further, immigration is a
 23 civil proceeding so lawyers are held to a civil standard for their ethics in terms of only
 24 putting forth meritorious claims. Ms. Edward should not be allowed to be sued for failure to
 25 put forth a claim she felt was not meritorious.

26 1. Ms. Edward must be judged by information known or knowable at the time

1 Ms. Edward complied with the standard of care in her representation of Mr. Ertur.
 2 The representation was terminated because Mr. Ertur was not forthcoming and did not make
 3 significant and material disclosures to her about pertinent matters, such as pending
 4 antiharassment claims by Mr. Ertur's wife, and because he would not pay his bill for
 5 representation.

6 The crux of Mr. Ertur's case against Ms. Edward has always been that somehow she
 7 must have been negligent to not suggest proceeding with a VAWA claim because he was
 8 subsequently able to get an I360 granted. This is an inappropriate argument. It seeks to hold
 9 her accountable for judgments entered by information not known or knowable at the time.
 10 And, it would hold Ms. Edward to a standard of submitting or recommending the submission
 11 of potentially incomplete or misleading application materials, such as those submitted by Mr.
 12 Ertur. It is speculative whether there was information available to anyone at the time Ms.
 13 Edward represented Mr. Ertur that would have supported a successful VAWA application
 14 Report of Nightingale at p. 12, Ex. B, Sec. Decl. Howard. But, from an expert review of the
 15 information that was available, it was appropriate for her to not pursue such a claim or to
 16 recommend pursuit of such a claim. *Id.* at pp. 12-15.

17 The only evidence offered by plaintiff is a report authored by plaintiff's own counsel,
 18 who is not disinterested and not qualified to testify as an expert and to be counsel at the same
 19 time. Even the fact that an I360 was subsequently granted¹ does not create an issue of fact as
 20 to what the reasonable practitioner of immigration law should have done at the time Ms.
 21 Edward represented Mr. Ertur. The facts available were not the same. And, not an area
 22 readily amenable to lay assessment of the standard of care, such as the missing of the statute
 23 of limitations by Mr. Ertur's prior counsel. Here the expert testimony report of Mr.

24
 25 ¹ Although that matter has now been reopened at the initiative of the Vermont Service
 26 Center, so the final resolution is unclear See Second Declaration of Christopher Howard,
 dated January 16, 2007.

1 Nightingale explains the fairly sophisticated immigration law and how that supports Ms.
 2 Edward having complied with the standard of care. That testimony is, in effect, unrefuted.
 3 A summary judgment should be granted on the issue of standard of care, and plaintiff's claim
 4 should be dismissed.

5 2. Ms. Edward's should not be held to a standard requiring her to pursue what
 6 she believes to be a meritless claim.

7 The testimony before the court establishes that Ms. Edward did not see a basis of
 8 pursuing a VAWA claim. Unlike criminal defense, immigration practitioners in the Ninth
 9 Circuit are held to a civil standard with respect to bringing forth meritorious claims [add
 10 citation]. Ms. Edward was ethically obligated to not pursue a VAWA claim in the absence of
 11 perceiving any merit for such a claim. Her lack of perceiving any merit is supported by
 12 expert review of substantial file materials. Report of Nightingale at pp. 12-15, Ex. B, Sec.
 13 Decl. Howard.

14 Plaintiff cannot defeat this position by suggestion she should have educated him on
 15 how to bring a VAWA claim even if she felt it lacked merit. The rules of professional
 16 conduct require the Washington lawyer to not assist in putting forth a claim which they
 17 believe lacks merit. RPC 3.1, as it was enacted at the time of this case, proscribed an
 18 attorney from bringing a claim or defense unless there is a basis for doing so that is not
 19 frivolous.

20 A lawyer shall not bring or defend a proceeding or assert or controvert an
 21 issue therein, unless there is a basis for doing so that is not frivolous

22 WA RPC 3.1 (pre-9/1/06 ver.)

23 The fact that the proceedings against Mr. Ertur were subsequently resolved and that
 24 the divorce was subsequently resolved in his favor does not change the facts as they were
 25 known to Ms. Edwards at the time.

26 Plaintiff's argument in effect would require Ms. Edward to have violated the rules of

1 professional conduct by either seeking to pursue a claim she felt lacked merit, or educating a
 2 plaintiff on he might pursue a claim that lacked merit. The fact that the claim may have had
 3 more evidence to support it at a substantially later date or at the time Ms. Edward
 4 represented Mr. Ertur there was not a substantial basis for bringing a VAWA claim.
 5 Plaintiff's claim against Ms. Edwards should be dismissed.
 6

7 **D. Plaintiff can not Prove any Causation between his Alleged Damages and**
 8 **Ms. Edward's Representation**

9 Plaintiff's allegation that Ms. Edwards should have pursued a valid claim for relief
 10 and/or informed him of the availability of such relief lacks any causal connection to his
 11 claimed damages for several reasons:

- 12 • Overall, the VAWA appeal process and various stays of removal and
 13 motions to reopen that would be associated with the granting of an
 14 I360 are all discretionary processes. The outcome could not be
 15 guaranteed or predicted, but would be appropriate for this Court to
 16 review as a matter of law. *See Brust v. Newton*, 71 Wn. App. 286, 852
 17 P2d 1092 (1993) review denied 123 Wn.2d 1010 (1994); *Nielson v.*
 18 *Eisenhower and Carlson*, 100 Wn. App. 584, 993 P.2d 42 (2000).
- 19 • There has been no evidence presented by plaintiff that an earlier
 20 application for VAWA would have achieved the same provision al
 21 granting of an I360 that was achieved after the resolution of the
 22 divorce. There is contrary testimony provided in the expert report of
 23 Zachery Nightengale. *See Report of Nightingale*, pp. 13-15, Ex. B,
 24 Sec. Decl. Howard;
- 25 • There was evidence known at the time of potential marriage fraud
 26 from this and Mr. Ertur's prior marriage. Either of these would make

1 Mr. Ertur ineligible for VAWA relief or for relief based upon the I360.
 2 *Id.*

- 3 • There has been no dispute that Mr. Ertur learned of the potential
 4 VAWA relief before any deadline to move to reopen the court had
 5 passed. Mr. Ertur did not make such a petition or a motion to reopen
 6 to allow him to file for VAWA relief at that time, nor did he do so for
 7 several months after that favorable divorce ruling. *See* Report of
 8 Nightingale, pp. 15-16. There was a legal basis to seek to reopen at
 9 that time, had it been brought appropriately. But it was not, and that
 10 was not due to the representation of Ms. Edward;
- 11 • Mr. Ertur did obtain an I360 approval from the Vermont Service
 12 Center neither he nor his counsel at that time took appropriate steps to
 13 reopen. *See* Report of Nightingale at pp. 16-18, Ex. B, Sec. Decl.
 14 Howard. What steps were taken were rejected by the Court. *Id.*
- 15 • The I360 in and of itself does not entitle Mr. Ertur to stay in the United
 16 States, and Plaintiff has put forth no evidence to show that he would
 17 be entitled to that relief even given his special immigrant petition
 18 being granted. He must still show evidence that he would overcome
 19 allegations of marriage fraud and other allegations that would make
 20 him otherwise ineligible for consideration even with the I360
 21 approval. *See*, 8 U.S.C. § 1182 and INA § 212.
- 22 • Mr. Ertur's physical removal from the United States was specifically
 23 due to his and his counsel's inaction between April 5, 2005 (when his
 24 I360 was approved) and June 9, 2005. *See* Report of Nightingale, at p.
 25 19, Ex. B, Sec. Decl. Howard;
- 26 • Finally, to the extent that plaintiff's cases are all based upon inferences

1 to be drawn from the fact he was granted an I360 by the Vermont
2 Service Center that has been reopened, and is no longer a final
3 determination. *See* Exhibit A to Sec. Decl. of Howard.

4 The report of Zachary Nightingale clearly establishes that there was a two month
5 period of time that should have been sufficient to obtain a stay or removal based upon the
6 ultimate granting of the I360 in 2005. The absence of any appropriate action during that time
7 cannot be the responsibility of Ms. Edward. The failure to get his removal action reopened
8 was not due, in any way, to any misrepresentation of Ms. Edward.

9 Each of the bullet points above demonstrates a sufficient causal break between the
10 allegations against Ms. Edwards and the allegations of damages by the plaintiff. Plaintiff can
11 show no facts or law to support a claim in light of each of these breaks in the causal chain.
12 The Plaintiff's claims should be dismissed.

13 **E. At Best, Ertur's Case Rests on Speculation**

14 To the extent that Plaintiff's case is premised upon making an inference from the
15 granting of I360 that there was a basis for filing for such relief at an earlier time, that
16 inference is flawed because the I360 itself does not confer the benefit of allowing Ertur to
17 stay in the United States; he must still prove he is otherwise eligible. And any such inference
18 is destroyed by the government's reopening of Mr. Ertur's case upon their own initiative.
19 Mr. Ertur does not have a determination that he is entitled to VAWA relief at this time. Any
20 argument seeking to judge prior counsel on his subsequent obtaining of VAWA relief should
21 be rejected.

22 **F. Conclusion**

23 Ertur was removed from this country because he lost his Hearing before the
24 immigration court. A prior counsel missed the filing date for the appeal. All motions to
25 reopen before the "Bureau of Immigration" were found to lack merit. Even when he
26 obtained an I360 through his petition for VAWA relief, he and the counsel he had at the time

1 failed to seek relief at the appropriate jurisdictional level (the BIA), and he was removed.
2 All of these reasons are unrelated to the representation of Mr. Ertur by Ms. Edward. Ms.
3 Edward complied with the standard of practice when she represented Mr. Ertur. The claims
4 against Defendants should be dismissed, with prejudiced, and costs.

5 VI. PROPOSED ORDER

6 A proposed order is attached.

7
8 Dated this 17th day of January, 2007.

9 SCHWABE, WILLIAMSON & WYATT, P.C.

10
11 By: 

12 Christopher H. Howard, WSBA #11074
13 David R. Ebel, WSBA #28853
14 Attorneys for Defendants
15 Carol L. Edward and Jesse F. Berger
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BULENT ERTUR, a single man,

Plaintiff,

v.

CAROL L. EDWARD and JESSE F.
BERGER, husband and wife, and the marital
community composed thereof; CAROL L.
EDWARD, P.S., a Washington Professional
Service Corporation doing business in
Washington,

Defendants.

Case No. 05-1532 JLR

PROPOSED ORDER

This matter, having come on before the Court on Defendants' Motion for Summary Judgment and Motion to Strike the Expert Report of Ahmet Chabuk, and the Court having reviewed the file, and having specifically reviewed:

1. Defendants' Motion for Summary Judgment of Dismissal and Motion to Strike Expert Report of Ahmet Chabuk dated January 17, 2007;
2. The Second Declaration of Christopher Howard in Support of Defendants' Motion for Summary Judgment dated January 17, 2007, specifically including Exhibit B to that Declaration, the Expert Report of Zachary M. Nightingale dated October 19, 2006;
3. Declaration of Carol L. Edward dated December 23, 2005, which is already

PROPOSED ORDER: Case No. 05-1532 JLR - 1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3010
Seattle, WA 98101
206.622.1711

1 on file with this Court, Docket No. 12;

2 4. Declaration of Christopher Howard dated December 27, 2005, which is
3 already on file with this Court, Docket No. 11;

4 5. Plaintiff expert report of Ahmet Chabuk, dated November 20, 2006, Docket
5 No. 32;

6 and such pleadings as were filed by the Plaintiff in opposition to this motion, and the rest of
7 the pleadings on file in this case, and, having fully considered this matter, now therefore,

8 IT IS HEREBY ORDERED that the Expert Report of Ahmet Chabuk is stricken, and
9 the proffered testimony is disallowed;

10 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is
11 granted, and Plaintiff's claims against Defendants are dismissed, with prejudice, and costs.


12 Dated this ____ day of February, 2007.

13
14

Judge James L. Robart

15
16 Presented by:

17 
Schwabe Williamson & Wyatt

18 By: 
19 Christopher H. Howard, WSBA #11074
David R. Ebel, WSBA #28853

20 Copy received:

21
22

Ahmet Chabuk, WSBA #22543

23
24
25
26 PROPOSED ORDER: Case No. 05-1532 JLR - 2

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3010
Seattle, WA 98101
206.622.1711